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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Joseph A. Trenton, et al.,) No. CV 08-1250-PHX-MHM (DKD)
Plaintiff,)
vs.) **ORDER**
Dora B. Schriro, et al.,)
Defendants.)

)

I. Background

17 On July 3, 2008, Plaintiff Joseph A. Trenton, who is confined in the Arizona State
18 Prison Complex-Tucson In Tucson, Arizona, filed a *pro se* civil rights Complaint, on behalf
19 of himself and other inmates, pursuant to 42 U.S.C. § 1983. Plaintiff did not pay the \$350.00
20 civil action filing fee or file a proper Application to Proceed *In Forma Pauperis*.

21 In a July 14, 2008 Order, the Court dismissed all of the plaintiffs other than Plaintiff
22 Trenton, noted that Plaintiff Trenton had neither paid the filing fee or filed an Application
23 to Proceed *In Forma Pauperis*, and dismissed the Complaint, without prejudice, because
24 Plaintiff Trenton had not filed on the court-approved form. The Court gave Plaintiff Trenton
25 30 days to pay the filing fee or file an Application to Proceed and 30 days to file an amended
26 complaint on the court-approved form.

1 On August 1, 2008, Plaintiff Trenton and others filed a First Amended Complaint
 2 (Doc. #4) and a “Motion for Certification as a Class-Action; and Motion for Appointment
 3 of Legal Counsel” (Doc. #5). Plaintiff Trenton also filed a Application to Proceed *In Forma*
 4 *Pauperis* (Doc. #6).

5 **II. Dismissal of Additional Plaintiffs**

6 In addition to Plaintiff Trenton, the following are listed as Plaintiffs on the First
 7 Amended Complaint: Kenneth Schwan, Bryan Baker, Troy J. Diets, Little Baca, Bobby R.
 8 Thomas, Danny Strahan, and Shawn M. Atkinson.

9 First, Plaintiff Trenton has no authority to bring this action on behalf of the other
 10 plaintiffs. “[C]onstitutional claims are personal and cannot be asserted vicariously.” Johns
 11 v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997). A party is permitted to plead and
 12 conduct his or her case “personally or by counsel.” 28 U.S.C. § 1654. A non-lawyer may
 13 appear on his own behalf in his own case but “has no authority to appear as an attorney for
 14 others than himself.” Johns, 114 F.3d at 876 (quoting C.E. Pope Equity Trust v. United
 15 States, 818 F.2d 696, 697 (9th Cir. 1987)).

16 Second, all prisoners who file civil actions must pay the full amount of the filing fee
 17 either at the time the lawsuit is filed or, if granted leave to proceed *in forma pauperis*,
 18 incrementally. See Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002) (citing 28 U.S.C.
 19 § 1915(b)(1)). None of the plaintiffs has paid the filing fee and only Plaintiff Trenton has
 20 filed an Application to Proceed *In Forma Pauperis*.

21 Third, pursuant to Local Rule of Civil Procedure 3.4(a), complaints must be signed.
 22 Shawn M. Atkinson did not sign the First Amended Complaint.

23 All of the Plaintiffs other than Plaintiff Trenton will be dismissed without prejudice.
 24 **Each dismissed Plaintiff may file an individual lawsuit on his own behalf.¹**

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 27 ¹The Court made this same statement in its July 14, 2008 Order. Plaintiff Trenton
 28 apparently disregarded it, as did Kenneth Schwan and Bryan Baker, both of whom were
 dismissed from the original complaint.

1 **III. Application to Proceed *In Forma Pauperis* and Filing Fee**

2 Plaintiff Trenton's Application to Proceed *In Forma Pauperis* will be granted. 28
 3 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C.
 4 § 1915(b)(1). The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1).
 5 The statutory fee will be collected monthly in payments of 20% of the previous month's
 6 income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The
 7 Court will enter a separate Order requiring the appropriate government agency to collect and
 8 forward the fees according to the statutory formula.

9 **IV. Statutory Screening of Prisoner Complaints**

10 The Court is required to screen complaints brought by prisoners seeking relief against
 11 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
 12 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
 13 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
 14 be granted, or that seek monetary relief from a defendant who is immune from such relief.
 15 28 U.S.C. § 1915A(b)(1), (2).

16 **V. First Amended Complaint**

17 In his one-count First Amended Complaint, Plaintiff sues the following Defendants:
 18 Arizona Department of Corrections (ADOC) Director Dora B. Schriro, Regional Director
 19 Bennie H. Rollins, Northern Regions Operations Director L. Bartos; Protective Segregation
 20 Committee Board Members Herb Hailey and Maria Madrid; and unidentified Protective
 21 Segregation Committee Board Members.

22 Plaintiff alleges that Defendants have violated the Eighth Amendment prohibition
 23 against cruel and unusual punishment because they implement, oversee, and follow a
 24 protective segregation review policy that "refuse[s protective segregation] placement no
 25 matter what." Plaintiff states that he sought protective segregation placement "due to an
 26 objectively, sufficiently serious risk of harm in the ADOC General Population," that ADOC
 27 officials recommended protective segregation placement, but the Protective Segregation
 28 Board Members denied his requests and Defendants Rollins and Bartos denied his appeals.

1 Plaintiff alleges that the Defendants have acted with deliberate indifference by denying him
2 placement into protective segregation even after they were made aware of a sufficiently
3 serious risk of harm.

4 In his Request for Relief, Plaintiff seeks declaratory and injunctive relief, his
5 attorneys' fees and costs, and monetary damages.

6 Liberally construed, Plaintiff has stated a claim and the Court will require Defendants
7 to answer the First Amended Complaint.

8 The Court will not direct that service be made on the unidentified Protective
9 Segregation Committee Board Member Defendants at this time. The Court is unable to
10 identify these individuals, and, as a practical matter, it is virtually impossible for the United
11 States Marshal to serve a summons and complaint upon unknown persons. However, the
12 Court will not dismiss the claims against the unidentified Protective Segregation Committee
13 Board Member Defendants at this time. See Wakefield v. Thompson, 177 F.3d 1160, 1163
14 (9th Cir. 1999) (where identity of defendants is unknown prior to filing of complaint,
15 plaintiff should be given an opportunity through discovery to identify the unknown
16 defendants, unless it is clear that discovery would not uncover the identities or that the
17 complaint would be dismissed on other grounds).

18 Plaintiff may use the discovery process to obtain the names of the unidentified
19 Protective Segregation Committee Board Member Defendants. If Plaintiff later discovers
20 the identities of the unidentified Protective Segregation Committee Board Member
21 Defendants, Plaintiff should amend his complaint to name them. Pursuant to Rule 15 of the
22 Federal Rules of Civil Procedure, a party may amend the party's pleading once as a matter
23 of course at any time before a responsive pleading is served. Otherwise, a party may amend
24 the party's pleading only by leave of court or by written consent of the adverse party.

25 **VI. Motion for Certification and Appointment of Counsel**

26 In his "Motion for Certification as a Class-action; and Motion for Appointment of
27 Legal Counsel," Plaintiff seeks to have the Court certify this action as a class action, alleges
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1 that this action meets the requirements of Rule 23 of the Federal Rules of Civil Procedure,
 2 and seeks an appointment of counsel to represent the class.

3 One prerequisite to maintaining a class action is that the class “representative parties
 4 will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). It
 5 follows that a class action may not be certified where the representative parties are without
 6 counsel. See McShane v. United States, 366 F.2d 286, 288 (9th Cir. 1966) (non-lawyer had
 7 no authority to appear as an attorney for other persons in a purported class action); C.E. Pope
 8 Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) (while a non-attorney may
 9 represent himself, he has no authority to appear as an attorney for others); Oxendine v.
 10 Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) (plain error to permit an inmate proceeding
 11 *pro se* to represent fellow inmates in a class action). “This rule is an outgrowth not only of
 12 the belief that a layman, untutored in the law, cannot ‘adequately represent’ the interests of
 13 the members of the ‘class,’ but also out of the long-standing general prohibition against even
 14 attorneys acting as both class representative and counsel for the class.” Huddleston v.
 15 Duckworth, 97 F.R.D. 512, 514 (N.D. Ind. 1983). Accordingly, before deciding whether this
 16 matter can proceed as a class action, the Court must first determine whether this is a case that
 17 merits the appointment of counsel.

18 There is no constitutional right to appointment of counsel in a civil case. See Ivey v.
 19 Board of Regents of University of Alaska, 673 F.2d 266, 269 (9th Cir. 1982). In proceedings
 20 *in forma pauperis*, the court may request an attorney to represent any person unable to afford
 21 one. 28 U.S.C. § 1915(e)(1). Appointment of counsel under 28 U.S.C. § 1915(e)(1) is
 22 required only when “exceptional circumstances” are present. Terrell v. Brewer, 935 F.2d
 23 1015, 1017 (9th Cir. 1991). A determination with respect to exceptional circumstances
 24 requires an evaluation of the likelihood of success on the merits as well as the ability of
 25 Plaintiff to articulate his claims *pro se* in light of the complexity of the legal issue involved.
 26 Id. “Neither of these factors is dispositive and both must be viewed together before reaching
 27 a decision.” Id. (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986)).
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1 Having considered both elements, it does not appear at this time that exceptional
2 circumstances are present that would require the appointment of counsel in this case.
3 Therefore, the Court will deny without prejudice the request for counsel.

4 In light of the denial of Plaintiff's request for the appointment of counsel, the Court
5 will deny Plaintiff's Motion because Plaintiff, notwithstanding his self-proclaimed status as
6 a "jailhouse lawyer," will not be able to fairly and adequately protect the interests of the
7 class. See Fed. R. Civ. P. 23(a)(4).

8 **VII. Warnings**

9 **A. Release**

10 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
11 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
12 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
13 in dismissal of this action.

14 **B. Address Changes**

15 Plaintiff must file and serve a notice of a change of address in accordance with Rule
16 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
17 relief with a notice of change of address. Failure to comply may result in dismissal of this
18 action.

19 **C. Copies**

20 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy
21 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
22 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
23 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
24 may result in the filing being stricken without further notice to Plaintiff.

25 **D. Possible Dismissal**

26 If Plaintiff fails to timely comply with every provision of this Order, including these
27 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,

1 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
2 comply with any order of the Court).

3 **IT IS ORDERED:**

4 (1) Plaintiffs Kenneth Schwan, Bryan Baker, Troy J. Diets, Little Baca, Bobby R.
5 Thomas, Danny Strahan, and Shawn M. Atkinson are **dismissed** without prejudice to each
6 of them filing an individual lawsuit on his own behalf.

7 (2) Plaintiff Trenton has provided the names and ADOC inmate numbers of the
8 seven other Plaintiffs:

9 Kenneth Schwan, ADOC #105774
Troy J. Diets, ADOC #158651
10 Bobby R. Thomas, ADOC #063071
Shawn M. Atkinson, ADOC #205432

Bryan Baker, ADOC #186807
Little Baca, ADOC #065723
Danny Strahan, ADOC #068912

11 As a courtesy to the dismissed Plaintiffs, the Clerk of Court **must mail** a copy of this
12 Order to them at the following address:

13 ASPC-Eyman
14 SMU I Unit
15 Inmate Name and ADOC #
P.O. Box 4000
16 Florence, AZ 85232

17 (3) Plaintiff Trenton's Application to Proceed *In Forma Pauperis* (Doc. #6) is
granted.

18 (4) As required by the accompanying Order to the appropriate government agency,
Plaintiff Trenton must pay the \$350.00 filing fee and is not assessed an initial partial filing
20 fee.

21 (5) The "Motion For Certification as a Class-Action; and Motion for Appointment
22 of Legal Counsel" (Doc. #5) is **denied**.

23 (6) Defendants Schriro, Rollins, Bartos, Hailey, and Madrid must answer the First
Amended Complaint.

24 (7) The Clerk of Court must send Plaintiff a service packet including the First
Amended Complaint (Doc. #4), this Order, and both summons and request for waiver forms
27 for Defendants Schriro, Rollins, Bartos, Hailey, and Madrid.

1 (8) Plaintiff must complete and return the service packet to the Clerk of Court
2 within 20 days of the date of filing of this Order. The United States Marshal will not provide
3 service of process if Plaintiff fails to comply with this Order.

4 (9) If Plaintiff does not either obtain a waiver of service of the summons or
5 complete service of the Summons and First Amended Complaint on a Defendant within 120
6 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever
7 is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m);
8 LRCiv 16.2(b)(2)(B)(i).

9 (10) The United States Marshal must retain the Summons, a copy of the First
10 Amended Complaint, and a copy of this Order for future use.

11 (11) The United States Marshal must notify Defendants of the commencement of
12 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
13 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. The
14 Marshal must immediately file requests for waivers that were returned as undeliverable and
15 waivers of service of the summons. If a waiver of service of summons is not returned by a
16 Defendant within 30 days from the date the request for waiver was sent by the Marshal, the
17 Marshal must:

18 (a) personally serve copies of the Summons, First Amended Complaint, and
19 this Order upon Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil
20 Procedure; and

21 (b) within 10 days after personal service is effected, file the return of service
22 for Defendant, along with evidence of the attempt to secure a waiver of service of the
23 summons and of the costs subsequently incurred in effecting service upon Defendant.
24 The costs of service must be enumerated on the return of service form (USM-285) and
25 must include the costs incurred by the Marshal for photocopying additional copies of
26 the Summons, First Amended Complaint, or this Order and for preparing new process
27 receipt and return forms (USM-285), if required. Costs of service will be taxed against
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the personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise ordered by the Court.

(12) A Defendant who agrees to waive service of the Summons and First Amended Complaint must return the signed waiver forms to the United States Marshal, not the Plaintiff.

(13) Defendants must answer the First Amended Complaint or otherwise respond by appropriate motion within the time provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

(14) Any answer or response must state the specific Defendant by name on whose behalf it is filed. The Court may strike any answer, response, or other motion or paper that does not identify the specific Defendant by name on whose behalf it is filed.

(15) This matter is referred to Magistrate Judge David K. Duncan pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings.

DATED this 12th day of September, 2008.

Mary H. Murguia
United States District Judge